Supreme Court of the United States

640

OCTOBER TERM, 1948.

No. 640.

UNITED STATES OF AMERICA, PETITIONER,

VS.

FRED URBUTEIT, CLAIMANT OF 16 ARTICLES OF DEVICE, MORE OR LESS, LABELLED "SINUOTHERMIC," ETC.

BRIEF FOR THE RESPONDENT.

H. O. PEMBERTON,
Tallahassee, Florida,
Counsel for Respondent.

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STATEMENT.

The complete record of the trial in the District Court, proceedings in the Court of Appeals and the briefs of counsel before this Court appear in the files of this Court (No. 13, October Term, 1948) and this Court's opinion thereon in 335 U. S. 355.

The case was remanded by this Court to the Court of Appeals for further proceedings, whereupon the Court

of Appeals again considered the case, wrote a new opinion (R. 6—not yet reported) reversing the District Court and remanded it to that Court for further proceedings in conformity with the opinion of this Court and the opinion of the Court of Appeals.

Petitioner questions the rightness of the opinion of the Court of Appeals and contends that:

1. The Court of Appeals violated this Court's mandate in remanding the case to the District Court with directions to further investigate the facts as to the relationship between advertising and the several shipments of machines; and

2. The Court of Appeals failed to comply with the mandate of this Court when it did not specifically mention in its opinion the claim of the Government that it is entitled to a decree because of what it claims to be the false character of the advertising matter as respects the diagnostic capabilities of the devices.

SUMMARY OF ARGUMENT

The petition should not be granted because:

1. The Court of Appeals has simply directed the District Court to apply the statutory construction made by this Court to the facts of the case and has not violated the mandate.

2. The Court of Appeals considered the question of whether or not the Government should be entitled to a decree and decided it in the negative.

ARGUMENT.

1. The Court of Appeals has not violated the mandate of this Court.

In its opinion this Court construed a statute and in the making of that construction said "In this case it is plain to us that the movements of machines and leaflets in interstate commerce were a single interrelated activity, not separate or isolated ones" (335 U. S. at 357).

This Court made no effort to sift the evidence and see if each and every of the shipments and of the machines were part of a single interrelated activity with the one shipment of advertising matter—for such a sifting was not necessary to a construction of the statute involved—but that is what the Court of Appeals has done in carrying out the mandate of this Court, and it has found that the evidence is not definite and has directed the District Court to investigate that question more carefully on a new trial in the light of this Court's enunciation of the principles involved. That is plain common sense. An examination of the record of proceedings in the District Court will disclose that the only time machines and advertising matter were shown to be together in any manner was on September 5, 1945, when an inspector for the Food and Drug Administration saw four leaflets in the office of Dr. Kelsch (R. 17—Case No. 13, October Term, 1948), whereas the last shipment of machines was not even delivered to the Express Company in Tampa, Florida, until September 21, 1945. There is no evidence to show what, when

or how any of the machines or the advertising matter were ordered except the testimony of Dr. Kelsch that he discussed getting some machines and literature with Dr. Urbuteit while in Tampa in June, 1945 (R. 29—Case No. 13). The evidence is skimpy. The situation might be illustrated by comparing it to the shooting of a man by some person in a crowd of twenty people. The man was shot but it is necessary to show which one of the twenty people did the shooting. Figuratively speaking, this Court has determined that a man was shot. The Court of Appeals has informed the District Court that this Court has decided that a man was shot but points out that the evidence does not show just who in the crowd is guilty and therefore directs the District Court to investigate the facts and determine just which one did the shooting.

The Court of Appeals has not violated this Court's mandate but has simply directed the District Court to apply the principles enunciated by this Court in an orderly manner in conformity to sound principles of justice.

2. The Court of Appeals did not fail to consider the question of whether or not the Government should have a decree on the evidence as to false claims regarding diagnosis.

The only basis for petitioner's claim that the Court of Appeals failed to consider the question is the absence of comment thereon in the opinion. It is a common practice in all courts to omit from an opinion or order any reference to some questions that are raised by counsel and considered by the court. If this Court denies the

petition now being argued without discussing in its order each question raised will that mean the Court failed to consider the questions? The answer is obvious.

If petitioner actually thought the Court of Appeals had in some way overlooked the question and the lengthy argumentative motion (R. 1) thereon, petitioner would have filed a petition for a re-hearing. The insertion in the Petition for Certiorari of the charge that the Court of Appeals failed to consider the question is simply an effort to have this Court review the adverse ruling of the Court of Appeals on a question which this Court has already refused to pass on.

CONCLUSION.

Respondent respectfully submits that there is nothing for this Court to review and that the Petition for Certiorari should be denied.

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April, 1949.